

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1443

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- x
UNITED STATES OF AMERICA, :
 :
Appellee, :
 :
-against- :
 :
DENNIS BENNETT, :
 :
Defendant-Appellant. :
----- x

To be argued by
Rigdon H. Boykin

Docket No. 77-1443

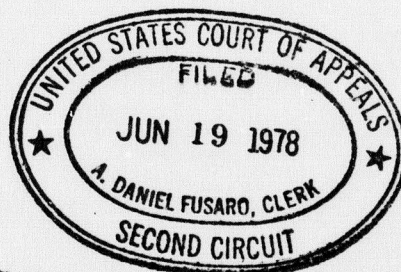
Docket No. 78-T8792

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BRIEF FOR DENNIS BENNETT

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BRIEF FOR DENNIS BENNETT

Statement of the Case

This is a consolidated appeal from a judgment and an order of the United States District Court for the Eastern District of New York.

The judgment was rendered on September 30, 1977 convicting Dennis Bennett ("Dennis"), after a jury trial, of (1) conspiring to distribute and posses with intent to distribute quantities of heroin and (2) aiding and abetting in the possession with intent to distribute a quantity of heroin in violation of 18 U.S.C. § 2 and 21 U.S.C. §§ 841(a)(1) and § 846. Dennis was sentenced to a term of ten years on both counts and a special parole term of twenty years all to run concurrently. The condition of the special parole is that if the petitioner "is

deported he is not to re-enter the United States, its territories or possessions during this special parole term." Mishler, (CJUSDC).

The second order is the denial on April 17, 1978 of appellant's motion pursuant to 28 U.S.C. § 2255 for an order vacating and setting aside the aforementioned judgment of conviction.

Notice of appeal with respect to the judgment of conviction was filed on September 30, 1977. On November 10, 1977, the Court of Appeals for the Second Circuit appointed the undersigned as counsel for the petitioner.

Following the appointment, a motion, pursuant to 28 U.S.C. § 2255, to vacate the judgment of conviction on the ground of incompetency of trial counsel was prepared on behalf of Dennis. Upon the order denying that motion, a notice of appeal was filed on May 15, 1978.

Subsequently, upon the appellant's motion, on May 30, 1977 this Court granted leave for the appellant to proceed in forma pauperis and consolidated the two appeals.

Questions Presented

1. Was the appellant denied effective assistance of counsel at trial? Appellant contends that the trial attorney failed to analyze and comprehend the Government's case. This failure had three results: (i) the trial counsel failed to

present certain evidence at trial which would have presented a substantial defense, (ii) the failure to inform the jury of the essential elements of the Government's case, and (iii) the failure to object to jury instructions which mislead the jury.

2. Was it patent error to give an entrapment charge?

3. Was the failure of the trial judge to specify the particular nature of the crimes charged patent error?

4. Was the evidence sufficient to support a jury verdict of guilty on either count?

Preliminary Statement

This appeal involves the adequacy of counsel and the charge given to the jury. The facts proved at trial show that the government induced a person known to appellant to sell narcotics to him. Appellant was convicted of conspiracy and aiding and abetting. The jury was led to believe that the conspiracy and aiding and abetting took place when appellant purchased narcotics from the government's agent. Appellant's trial counsel did not understand the government's case which changed substantially during trial. For example, he did not realize that appellant could not conspire with or aid and abet the government's agent. As a result he did not present evidence which would have constituted a substantial defense and did not object to a misleading charge being given to the jury.

Facts in Record

Francisco Estrada-Ponce ("Francisco") was arrested at Kennedy Airport along with his brother Jose Estrada-Ponce and his girlfriend Anna Sarabia ("Anna") on March 25, 1977. This arrest was made by Thomas Sharkey ("Sharkey"), an agent for the Drug Enforcement Administration, as the result of some information received from a police officer in California who had observed Francisco, his brother and Anna board a plane in Los Angeles for Kennedy Airport.

Upon realizing that Sharkey had caught him with approximately two kilos of heroin, Francisco offered to make a "controlled delivery" to his purported buyer. Francisco was told by Sharkey that "everything he told me or assisted me with in the investigation would be made, told to the assistant U.S. prosecuting attorney as well as to the probation office and as well as to the Judge." (App. p. 104)*

Sharkey took Francisco, or "Frankie" as Sharkey called him, to the Sheraton Motor Inn ("Sheraton") located at 42nd Street and 12th Avenue in Manhattan. Upon arrival at the Sheraton at approximately 2:00 a.m. on March 26, Sharkey rented two adjoining rooms, 1608 and 1610. Francisco was placed in 1608 and Sharkey and a number of agents used Room 1610. A representative sample of the heroin which had been seized from

* The pages of the transcript or exhibits in this case which are referred to in this brief are included in the Appendix. All cites will be to the page number of the appendix as "App. p. ____."

Francisco was placed in one of Francisco's suitcases and a much smaller sample was placed in an envelope for the buyer to take and have tested. (App. pp. 76-80)

Beginning early in the morning on March 26, Francisco, in the presence of Sharkey attempted to make a number of calls; however, there was no answer. Finally at approximately 12:15 p.m. there was an answer at the number. This call was taped. The conversation which was very audible was as follows:

F: FEMALE VOICE*

M: MALE VOICE

F: Hello

M: Hello Carol?

F: Oh well, hi

M: Hello

F: How you dong?

M: All Right.

F: Oh you just got back from Mexico?

M: Yea I come from Mexico.

F: Oh you should have seen my phone busy. I wanted to call you try to get with you.

M: Oh I call you all night, I you all night Carol.

F: No, you know why my phone, you know I have my phone on the jack and I plug it out sometimes thats why you can't get in touch with me.

* Gov't. Exhibit 26 Transcript of tape, admitted on consent.

M: Oh yea.

F: Well we talk about you every day, this guy call the other day, he asked for you, what you doing, or when you coming or something, you know I tell I don't know cause we haven't heard. Cause remember you called and gave me the new phone number?

M: Yea

F: We've been calling and calling, calling they say you not there.

M: Yea but I got some problems, you know down there in Mexico, too hard you know.

F: Aha, things hard, Hws's Ana?

M: Ana, Ana is pretty good she's with me.

F: How is, listen you going to bring her back right?

M: Yea

F: I was thinking about her the other day you know I could give her, you know like the baby shower, because you know like a party for the baby.

M: Yea

F: Right cause the baby's coming soon right.

M: Yea coming soon the baby

F: Aha

M: A ha. Hey, whats happening with my buddy

F: Well, he is all right, I seen him every time, but, em he, I won't probably see him until later on. You want him call you?

M: Look, I'm in the Sheraton Hotel.

F: Where?

M: In the Sheraton Hotel

F: In New York?

M: Yea I'm here in New York

F: Are you kidding?

M: Really

F: Ana there with you?

M: Eh?

F: Ana there with you?

M: Yea Ana is with me

F: When you came?

M: Last night. I try call you, all last night.

F: No the phone is was out, you know.

M: Nobody answer

F: No its, see we don't hear the ringing when I plug it out the wall, you hear it right but I don't hear it ring

M: Eh?

F: I don't hear the phone right, you know cause I pull it out, I can turn it off and turn it on.

M: Uh huh, O.K.

F: So, ah, you have the number then?

M: Yea I got the, I am, I am, I am in Room 1608

F: Whats that the one on 40th Street?

M: Yea the one I stay all the time. Yea the Sheraton Hotel.

F: Yea, its better that you didn't go to the Stadium, cause the guy, you know.

M: Yea its too many people there

F: Uh huh

M: Look tell, eh tell, tell Dennis I got the merchandise, O.K.

F: Uh huh O.K. whats the room number

M: Room number, its 1608

F: 1608

M: Yea

F: O.K. well eh, I don't know, I have to wait till he calls me

M: Uh huh

F: And then, ah, I'll tell him you know

M: O.K.

F: But I.. the number there is what 5, 6, you don't know the number?

M: Yea 695-65 double 0

F: Uh huh, and 1608

M: 1608

F: Uh huh, o.k. then well I'll have him call you or then I'll call you back later, o.k.?

M: O.K. tell him as soon as he can you know, because I gotta, I gotta leave, I gotta go back down there, you know some peoples waiting for me down there.

F: Uh huh

M: O.K. so tell -

F: By next week?

M: No I gotta go back eh, in a couple, eh tomorrow, I like to go back.

F: Uh huh, O.K. then well I'll tell him I'll try and get in touch with him, O.K.?

M: O.K.

F: O.K.

M: What, what time, what time you coming eh?

F: I don't know I'll try and call now but see I don't know, but I'll call you as soon as I hear from him and I'll let him call you and then we'll come down there later on.

M: O.K. you don't got any phone numbers to give it to try to call for him?

F: For him?

M: Yea

F: No, just eh, just this friend someone, he usually be there, sometimes, you know but I just call there cause I wanta get in touch with him, but he's not there.

M: O.K.

F: But I'll try and get in touch with him, he's supposed to call me and I'll have him call you, O.K.?

M: O.K. so eh Carol, I'll wait for yhour call O.K.

F: Right O.K. fine bye-bye..

M: Bye-bye."

Carol related the contents of the call to Dennis.

(App. p. 72)

Later that day at approximately 7:00 p.m. Francisco, with Sharkey at side, made another taped call to Carol. (App. p. 75) The contents of that conversation which again was very audible is as follows:

"F: Hello*

M: Hello, Carol there?

F: Oh hi Frankie

M: Hello Carol

F: Hi I haven't heard from DENNIS yet.

M: You didn't touch with him

F: No I can't get in touch with him and I haven't heard from him, but as soon as I hear from him I'll tell him to call you O.K.?

M: O.K.

F: I'm right here I'm waiting for him to me cause I never been out the house I'll be right here, O.K.? In case if he calls you know?

M: Aha

F: I'll give him your message for him to call you.

M: O.K., tell to call me right away because eh I gotta, gotta go you know

F: Yea

M: I can't stay so long here.

F: Aha

M: O.K.

F: O.K. then

* Gov't. Exhibit 26 Transcript of tape, admitted on consent. (App. pp. 62-66)

M: O.K.

F: Bye Bye

M: Bye

Later that night, while Carol and Dennis were on the way to the movies, Dennis stopped at the Sheraton to see Francisco. (App. p. 73) Carol remained outside with the car as they were unable to find a parking space. (Government Ex. 25, App. pp. 58-61)

The conversation which Dennis had with Francisco that night in Room 1608 at the Sheraton was recorded on tape by Sharkey. This recording was made with the use of a small transmitter which transmitted any noise in Room 1608 to a receiver and recording device located in Room 1610. (App. pp. 79, 81-82) Sharkey was in Room 1610 next to the connecting door attempting to overhear the conversation. (App. p. 82)

Unlike the two taped telephone calls, the quality of the recording of this conversation is poor at best. At times, either the transmitter was unable to pick up or transmit portions of the conversation or the receiver or tape recorder were not working properly. (App. pp. 67-68; App. pp. 97-99, 100) The Government made a transcription of those portions of this tape which it found to be audible.

As this short transcript is the Government's chief evidence against the petitioner and portions of the conversation

(or lack thereof) are crucial to this petition, it is reproduced herein below.*

BENNETT: I was asleep

FRANCISCO: Oh, too bad, eh, what's going on?

BENNETT: (Inaudible word) . . . Ana come?

FRANCISCO: No, eh, eh, downstairs, at a restaurant, downstairs with my brother.

BENNETT: Your brother come?

FRANCISCO: Yea. . . (inaudible words) I tell you your stuff up here on top.

BENNETT: So one, eh (inaudible words) I wanta go

FRANCISCO: O.K. . . . (inaudible words)

FRANCISCO:** Chiva***

BENNETT:** Oh, Chiva?
[Movement Noise, no conversation]

* The Court Reporter did not transcribe the tape which was played for the jury. Therefore, for the purposes of this appeal the transcript is being deemed in evidence. Any objections by the Government on this point are believed to be unfounded as the Government represented that the transcript is accurate with respect to the audible portions and insisted that the transcript be given to the jury.

The attorney representing the appellant at trial conceded that the transcript was accurate insofar as the Government was able to transcribe the audible portions of the tape. This transcript was marked Government Ex. 25 for identification and given to the jury as a guide in listening to the conversation. Indeed, the trial court remarked that it had difficulty in following the conversation without the transcript. (App. p. 98)

** The transcription in Government Ex. 25 for identification was erroneously typed from the 3500 material transcript so that the wrong person was depicted as stating these passages. This error has been corrected here upon the consent of the Government.

***"Chiva" is a slang term for heroin. (App. p. 103)

FRANCISCO: So what's going on, where is eh, where is Carol?

BENNETT: Downstairs, she's downstairs, she didn't come up, you know, no parking space.

FRANCISCO: She no?

BENNETT: No.

BENNETT:* I'm going to take this, take this, test out right away. Eh, what's this here now.

FRANCISCO:* The pure stuff

BENNETT:* Chiva?

FRANCISCO:* You know, CHIVA

BENNETT: O.K. cool

FRANCISCO: The pure stuff

BENNETT: How much is it?

FRANCISCO: I don't know I gotta get the weight

BENNETT: O.K.

BENNETT & FRANCISCO: (Inaudible words)

BENNETT: You got about a kilo, you got about a kilo.

FRANCISCO: 2 kilos, with a kilo of cut. . .inaudible.

BENNETT: How good is it?

FRANCISCO: It's pure, pure, pure. Pure stuff, pure stuff.

BENNETT: Pure stuff eh, how much is a kilo?

FRANCISCO: I don't know...should take three (inaudible)

BENNETT: Inaudible...the cut too, eh, you know

* The transcription in Government Ex. 25 (App. pp. 58-61) for identification was erroneously typed from the 3500 material transcript so that the wrong person was depicted as stating these passages. This error has been corrected here upon the consent of the Government.

BENNETT: Inaudible...the cut too, eh, you know

FRANCISCO: Inaudible...the cut...

BENNETT: O.K. good let me get on the case test. I'm going to take it to some people.

FRANCISCO: Money, you give me money, a little money for me?

BENNETT: No I don't have no money Frankie.

FRANCISCO: Oh my God, I've run out of money, you know, have no money here.

BENNETT: Well I'm going to try and get you some. I'll see if I can sell some of this tonight.

FRANCISCO: Cause, I gotta go tomorrow, you know.

BENNETT: You gotta go tomorrow?

FRANCISCO: I have to go with my brother (inaudible) do it, right here, you know and Ana is sick.

BENNETT: Ooh

FRANCISCO: He, he run out of, he rent a car at airport, you know my brother he got the Hertz cars, you know and eh, he rent a car, and eh, take care Ana downstairs to the streets over there 42. Forty second and I wait for there last night.

BENNETT: Yea, but you didn't call the house, did you?

FRANCISCO: Yea, but that phone not answer.

BENNETT: May I wasn't in.

FRANCISCO: Eh, Carol said he's in (inaudible word)

BENNETT: Oh yea, oh because some people was calling the house and telling her and writing my wife and telling my wife I was living with her.

FRANCISCO: Oh no, fuck

BENNETT: That's why she pulling the phone off.

FRANCISCO: Oh, O.K.

BENNETT: Em, God-Damn

FRANCISCO: You do something right away man because I, gotta move these things and...go back.

BENNETT: If you had a scale I could

FRANCISCO: Heh?

BENNETT: If you had a scale I could put some up there

FRANCISCO: Oh, no

BENNETT: And weigh it, so I could pay you

FRANCISCO: Well go sell, go weigh these things, sell this thing and come on back with the scale, with a guy whatever.

BENNETT: This I'm going to give this for sample I'm going to let them check it out.

FRANCISCO: Oh, Oh, O.K.

BENNETT: (Inaudible) then try and sell it like it is

FRANCISCO: Oh, O.K.

BENNETT: It's not cut, right, it not cut?

FRANCISCO: No, no, no, no, it's the pure ~~stuff~~.

BENNETT: Oh, is it pure?

FRANCISCO: The pure stuff, yea.

BENNETT: It's going for 33?

FRANCISCO: Yea, 33.

The very few words and phrases which Sharkey overheard through the door unfortunately do not add to the portions of the conversation which were audible. (App. p. 82)

At the end of the conversation, Derris was arrested in the hallway at the Sheraton outside Room 1608. The envelope

containing the small sample of heroin, 1.45 grams, was found in Dennis' right coat pocket. (App. pp. 83, 101, Gov't. Ex. 2, 8)

Sharkey testified that the market price of a kilo of heroin of the type in question ranges in price from \$35,000 to \$54,000. (App. p. 102) The heroin which was seized from Francisco was a little over one kilogram. (App. p. 104)

Dennis also was found to be in possession of two small cards. The first one had Francisco's name, an address and a telephone number on it. The second one had Frank Estrada written on it with the same phone number as on the first card. (App. pp. 84-86)

During the year 1976 and up to the time of Dennis Bennett's arrest, he had a girlfriend, Carolyn Usher ("Carol"). From time to time Dennis and Carol would rent a room at the Stadium Motor Lodge, West 167th Street and Major Degan Expressway, Bronx, New York. On one such occasion, January 12, 1977, Dennis rented a room adjoining that of a friend which he had met in California, Francisco Estrada-Ponce. Francisco was staying at the Stadium Motor Lodge with his girlfriend, Anna Sarabia.

Francisco, Anna, Dennis and Carol had dinner together at the Hawaii Kai restaurant and the conversation was about the band and the food. After dinner Carol and Dennis took Francisco and Anna back to the motel. Carol did not recall where she and Dennis went after leaving Francisco and Anna. Carol testified that she was with Dennis during that day from the morning until

late that night and there were no other meetings with Francisco. (App. pp. 69-71) Carol had met Francisco once before. (App. p. 74)

The Trial Court took judicial notice of the fact that Francisco was not available as a witness as he had absconded and bail was forfeited. (App. pp. 105-106)

Dennis has a prior narcotics record. On February 8, 1974, Dennis was convicted of distributing and possessing with intent to distribute heroin and sentenced to four years imprisonment. (App. p. 106)

The defense of appellant at the trial level was primarily restricted to an attempt, through cross-examination, to introduce the notion that Dennis thought that "Chiva," a slang term for heroin, was marijuana and that Dennis was entrapped into committing the crimes alleged. The appellant's trial counsel rested at the end of the government's case.

Facts Presented in the 28 USC § 2255 Proceeding

During the latter part of 1976, Linda Bennett, Dennis' wife, was living and working in Los Angeles, California. At the same time Dennis was in New York attempting to consummate the sale of a house which the Bennetts had purchased in 1972.

Mrs. Bennett had originally negotiated the sale of the house to the man who was presently living in the house. During the course of Dennis' effort to consummate the sale, it became apparent that the matter would require litigation and testimony by Mrs. Bennett.

As it appeared that the proceeding could be a long drawn out affair, the Bennetts decided to move back to New York until the matter was resolved. However, Dennis and Mrs. Bennett did not have the financial resources to effectuate the move. Therefore, Dennis persuaded Mrs. Bennett to let him pledge a ruby and diamond dinner ring owned by her along with a gold medallion owned by him for a loan of \$2,700. This loan was obtained from Francisco through a mutual friend.

This money was used to rent a Ryder truck to transport the Bennetts and their belongings to New York and to rent an apartment.*

After Dennis first introduced Francisco to Carol, he related to her the facts concerning the pledge of jewelry for the loan of \$2,700.00. In fact, sometime during the month of January, Dennis borrowed \$300.00 from Carol in order to reduce the balance due from \$700 to \$400. Carol recalls some discussion of the future return of the pledged jewelry at the dinner with Francisco and Anna at the Hawaii Kai.

When Francisco first called Carol on March 28, 1977, Dennis had just arrived about an hour previously. The contents of Francisco's conversation were related to Dennis and they were

* The background and facts concerning this loan is more fully detailed in the affidavit of Linda Bennett sworn to on December 9, 1977 in support of the § 2255 petition (App. pp. 9-10).

both surprised to hear that Francisco was in New York.* They assumed that he had brought the pledged jewelry and discussed the fact that neither of them had the \$400 which Dennis still owed Francisco. (Affidavit of Carolyn Usher, App. pp. 11-12).

Facts Concerning Adequacy of Representation

After arraignment and abandonment by his prior attorneys, appellant was initially interviewed by Edward J. Kelley, Esq., associate attorney-in-charge of the Federal Defender Service Unit, Criminal Defense Division, the Legal Aid Society. At that interview on May 20, 1977, Mr. Kelley was told about the loan and pledge of jewelry transaction with Francisco. He summarized the contents of that interview on a form which the Legal Aid Society normally uses to memorialize such interviews. (Affidavit of Rigdon H. Boykin sworn to December 16, 1977 in support of the 28 U.S.C. § 2255 petition, hereinafter referred to as "Boykin affidavit" (App. pp. 6-8). This memorandum was placed in the Legal Aid file given to his trial attorney.

* Carol's surprise is also certainly reflected in this excerpt from Government Ex. 26:

"F: Well, he is all right, I see him every time, but, em he, I won't probably see him until later on. you want him call you

M: Look, I'm in the Sheraton Hotel.

F: Where?

M: In the Sheraton Hotel

F: In New York?

M: Yea I'm here in New York

F: Are you kidding?

M: Really"

Prior to the beginning of the trial, the facts concerning the jewelry incident were related to the petitioner's trial attorney by Carol (Carol affidavit).^{*} Linda Bennett was not interviewed by the Legal Aid Society. Dennis has claimed that he also told his trial attorney about the jewelry pledge prior to trial (Boykin affidavit). The trial attorney upon being questioned about the jewelry pledge, stated that he does not recall being given such information and he does not recall the reference to the pledge in the memorandum by Mr. Kelley which was contained in the Legal Aid Society file. In addition, he stated that if he were aware of this information, he may have missed the significance of these undisclosed facts with respect to the evolving position which the government ultimately took in the case.

^{*} Despite the fact that her taped conversation was a primary piece of evidence at the trial, Carol was not interviewed by the trial attorney prior to the day of trial. On that day he asked her a few questions while she was in the courthouse waiting to testify pursuant to a Government subpoena. (Usher affidavit App. p. 12)

POINT I

TRIAL COUNSEL DID NOT ADEQUATELY ANALYZE
OR COMPREHEND THE GOVERNMENT'S CASE.

The appellant's trial counsel approached this case from a very simplistic view point - the actions of Dennis in the hotel room during the controlled delivery constituted the only acts of conspiracy, aiding and abetting. Therefore, he argued the defenses that Dennis was entrapped and Dennis thought that chiva was marijuana.

Trial counsel failed to consider at what point in time under the law could the aiding, abetting and conspiracy have taken place. Francisco was arrested at Kennedy airport on March 25, 1977. Shortly after the arrest, he agreed to become a Government agent and to make a controlled delivery. At that time any conspiracy with Francisco and any aiding and abetting Francisco by Dennis has to have ended. One cannot aid and abet an agent. Likewise one cannot conspire with an agent. In addition, there is no longer any heroin to purchase. United States v. Chase, 372 F.2d 453, 460-1 (4th Cir.) cert. denied, 387 U.S. 907 (1967); Lutwak v. United States, 344 U.S. 604, 616-19 (1953); Anderson v. United States, 417 U.S. 211, 217-9 (1974).

Thus, the crimes of conspiracy with Francisco and aiding and abetting Francisco had to have occurred at or prior to March 25, 1977. The telephone calls and events which took

place in the hotel room on March 26, 1977 are only relevant to the extent that they show an aiding, abetting and a conspiracy to import the heroin prior to Francisco's arrest on March 25, 1977. United States v. Chase, supra, 372 F.2d at 460-1. Lutwak v. United States, supra, 344 U.S. at 616-9 (1953); Anderson v. United States, supra, 417 U.S. at 217-9.

In Chase, four men were involved in running an illegal numbers game. Three were arrested in a raid on April 5th. One of those arrested offered to assist the Government in catching the fourth man. Thereupon, the former co-conspirator was allowed to continue operating the numbers game until the fourth man could be observed participating in the operation. He was then arrested. On appeal the admission of evidence concerning the events which took place after the three co-conspirators were arrested on April 5th was challenged. The court held that the conspiracy had terminated on April 5th and the acts and declarations of the fourth man which took place during the operation of the numbers game by the co-conspirator-turned agent were admissible against him only for the purpose of showing his intent and knowledge prior to April 5th.

POINT II

TRIAL COUNSEL'S DEFICIENT ANALYSIS ADVERSELY AFFECTED APPELLANT.

The lack of analysis by trial counsel had several adverse consequences.

Failure to Present a Substantial Defense

Trial counsel does not remember seeing the jewelry information contained in the memorandum by Mr. Kelley. He also does not recall discussing the jewelry loan transaction with the appellant or Carolyn Usher. While the Government has inferred in the § 2255 proceeding that the appellant and Carolyn Usher are lying and did not discuss the jewelry loan transaction with trial counsel, it is inconceivable that trial counsel did not see the memo in his analysis of the case. However, to him these facts were meaningless. Trial counsel was not concerned with events which took place prior to March 25, 1977. He was concerned with proving entrapment and mistake in Room 1608 of the Sheraton on March 26, 1977.

As discussed previously, a more thorough analysis of the Government's case reveals that due to (i) venue problems; (ii) the fact that the drugs did not leave the Government's control; and (iii) the fact that Francisco was acting as a Government agent; Dennis can only be tried for acts of conspiracy,

aiding and abetting which took place at or prior to the time Francisco was arrested at Kennedy Airport on March 25, 1977. Thus the telephone calls and the meeting in Francisco's hotel room on March 26, 1977 are relevant only to the extent they prove that Dennis had an arrangement with Francisco prior to the time of Francisco's arrest on March 25, 1977. Within the context of this analysis, the jewelry loan transaction assumes tremendous significance from the standpoint of providing the appellant with a meaningful defense.

The crucial question for the jury was did Dennis know prior to the time he met Francisco in Room 1608 at the Sheraton that Francisco was bringing heroin to New York? If Dennis did not know of the heroin prior to the time he entered the hotel room on March 26, 1977, he is not guilty of the crimes at issue in this case.

If the loan pledge transaction facts had been presented to the jury through Carol and Linda Bennett, the jury would have had a clear inference that: (1) Dennis thought that Francisco was returning the pledged jewelry; (2) Dennis went to the hotel to discuss the redemption of the pledge and the fact that he did not have the money to pay the balance due of \$400.00; and (3) upon learning of the heroin for sale after entering Francisco's room, decided to attempt to sell it for Francisco in light of the very favorable price being offered. An adoption of this

inference by the jury would necessarily result in a verdict of not guilty of the particular crimes charged.*

In its brief opposing the 28 U.S.C. § 2255 motion the Government took an "if you cannot respond to an issue, ignore it" approach. Appellant's point concerning the failure of trial counsel to analyze the Government's case was ignored. The Government took the position in its brief that all of these facts not placed in evidence were conjured up and at most amounted only to questioning the trial tactics of appellant's former counsel, a hindsight inquiry which cannot indicate inadequacy of counsel.

Appellant contends that in order to make a tactical decision, one must know the nature of the case. Not realizing that the Government had to prove an aiding, abetting and conspiracy prior to March 25, 1977, the trial counsel could hardly have made a tactical decision not to present this defense to the jury. The theories of defense used by trial counsel, entrapment and mistake on March 26, 1977 are not relevant to an aiding, abetting and conspiracy prior to March 25, 1977.

In its denial of the § 2255 motion the court below held that the appellant is simply questioning trial tactics and that trial counsel's approach was effective. Unfortunately, despite recognizing the appellant's position in its statement

* In actuality, the jury need not adopt this inference for such a finding. All that is necessary is that the inference supports a reasonable doubt for a finding of not guilty.

of position, App. p. 54, the court ignored the fact that the tactics of trial counsel were addressed to a crime for which Dennis could not be convicted.

Failure to Explain the Crimes Charged to the Jury

If a jury is to decide a person's guilt it is axiomatic that it must be told the exact nature of the crimes charged. The fundamental precepts of due process and justice require it.

Trial counsel did not distinguish for the jury the fact that Dennis was not on trial for any acts which took place after Francisco's arrest on March 25, 1977. They were not told that Dennis was not on trial because he took the heroin sample on March 26. As trial counsel did not realize the fact that Dennis was on trial for a conspiracy, aiding and abetting with Francisco prior to March 25, 1977, he was unable to explain this fact to the jury.

The discussion of entrapment and mistake on March 26, 1977 only served to further mislead the jury. It is submitted that the jury convicted Dennis of conspiracy, aiding and abetting not because of events prior to March 25, 1977 but because they felt the events on March 26th during the controlled delivery constituted the very acts of conspiracy and aiding and abetting.

Failure to Object to Erroneous Jury Charges

Another direct result of trial counsel's inadequate analysis of the case is his failure to object to certain jury

charges regarding the nature of the alleged crimes. For example, the court read the following portion of the indictment to the jury.

"On or about March 26, 1977, within the Eastern District of New York and elsewhere, the defendant, Dennis Bennett, and Francisco Estrada-Ponce, named herein as a co-actor, but not as a defendant, did knowingly and intentionally possess with intent to distribute a quantity of heroin hydrochloride, a Schedule I Narcotic Drug Controlled Substance.

This is in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2." App. pp. 28-29

In a later portion of the charge amplifying this portion of the indictment the court states:

The Government must first prove beyond a reasonable doubt that on or about March 26th Francisco Estrada-Ponce possessed the heroin as alleged in the count.

Two, that his possession was knowing and intentional, in other words that he was aware that he was possessing heroin and he intentionally possessed and controlled it.

And, three, that such possession was with intent to distribute. (App. p. 36)

Had trial counsel properly analyzed the case, he would have objected to this charge, and requested the court to instruct the jury that on March 26, 1977 Francisco was, as a matter of law, a government agent and Dennis could not conspire with or aid and abet with him.

POINT III

THE FAILURE TO ADEQUATELY ANALYZE OR COMPREHEND THE GOVERNMENT'S CASE CONSTITUTES INCOMPETENCE OF COUNSEL OF SUCH A MAGNITUDE AS TO VIOLATE THE SIXTH AMENDMENT.

There are two lines of precedent in the Second Circuit as to the standard of representation constitutionally required to be furnished an indigent defendant. The majority position is that in order to vacate a judgment of conviction and order a new trial the "lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." United States v. Wight, 176 F.2d 376, 379 (2nd Cir. 1949), cert. denied, 338 U.S. 950 (1950).

Since Wight there has been some erosion upon this very strict standard to the extent that some Second Circuit panels have apparently endorsed a questionably less stringent standard: "counsel was both grossly incompetent, and that 'the essence of a substantial defense' was thereby blotted out." United States ex rel. King v. Schubert, 522 F.2d 527, 529 (2nd Cir.), cert. denied, 423 U.S. 990 (1975); United States ex rel. Testamark v. Vincent, 496 F.2d 641 (2nd Cir. 1974), cert. denied, 421 U.S. 951 (1975); United States ex rel. Mitchell v. LaVallee, 417 F. Supp. 154 (S.D.N.Y. 1976), aff'd, 551 F.2d 301 (2nd Cir. 1976).

Six Circuits have squarely rejected the Wight standard and adopted a test which is more consistent with the con-

stitutional mandate of effective assistance of counsel for indigent defendants. The leading case, in the District of Columbia Circuit, holds:

"[A] defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate."
(Emphasis is the Court's) (United States v. DeCoster, 487 F.2d 1197, 1202 (D.C.Cir. 1973)).

Five other circuits have followed DeCoster's rejection of the farce and mockery test. Third Circuit, Moore v. United States, 432 F.2d 730, 736, en banc (1970); Fifth Circuit, United States v. Hayes, 444 F.2d 472, 475, cert. denied, 404 U.S. 882 (1971); United States v. Fessel, 531 F.2d 1275, 1278 (1976); Sixth Circuit, United States v. Toney, 527 F.2d 716, 720 (1975); Seventh Circuit, United States ex rel. Williams v. Twomey, 510 F.2d 634, 640, cert. denied sub nom., Sielaff, Corrections Director v. Williams, 423 U.S. 876 (1975); Eighth Circuit, Johnson v. United States, 506 F.2d 640, 646 (1974), cert. denied, 420 U.S. 978 (1975). Moreover, language in a Fourth Circuit opinion indicates that it also may have rejected the fraud and mockery test, Coles v. Peyton, 389 F.2d 224, 226, cert. denied, 393 U.S. 849 (1968).*

The Wight standard adopted by the Second Circuit is, therefore, a distinctly minority standard among the circuit courts

* The First Circuit has also indicated that given an appropriate case it might well adopt a less stringent test than the farce and mockery standard. Moran v. Hogan, 494 F.2d 1220, 1222 (1st Cir. 1974).

of appeals. Indeed, the disagreement with it within the Second Circuit has recently become more apparent. See, dissent of Judge Oakes in Rickenbacker v. Warden, Auburn Correctional Facility, 550 F.2d 62, 67 (2nd Cir. 1976); see also, United States v. Williams, 411 F.Supp. 854 (S.D.N.Y. 1976) in which the court sua sponte granted a mistrial due to the ineptitude of defendant's counsel. This mistrial was grounded upon a standard less than that of the farce and mockery test. In Williams the court stated:

"Our assessment of counsel's ineptness and inability competently to represent his client, especially in light of the insanity defense, was not erratic, as in Jorn, but was based on a reasonable apprehension, fortified by long experience as a trial judge, that the accused would not be fairly represented. The constitution requires that a defendant in a criminal case be represented by counsel. The Criminal Justice Act was passed to assure that an indigent defendant in a federal court receive experienced and adequate representation.

* * *

"The federal courts have the duty to implement the policies embodied in the Criminal Justice Act, as well as to ensure the general fairness of a criminal proceeding. This duty extends beyond the standards required by the constitution and must prevent even the possibility of unfairness. A district judge, therefore, cannot always remain a passive bystander but may have to intervene to assure that the facts of each case are presented to the jury in a clear and straightforward manner." (footnotes omitted) (411 F.Supp. at 856-7).

Moreover, recent Second Circuit panels have indicated that given the appropriate case they might well change the Wight-

Schubin test in favor of one similar to DeCoster. United States v. Medico, 557 F.2d 309, 318-19 (2nd Cir. 1977); Rickenbacker v. Warden, Auburn Correctional Facility, 550 F.2d 62, 65-66 (2nd Cir. 1976)*; see also, Wojtowicz v. United States, 550 F.2d 786, 792 (2nd Cir. 1977).

The farce and mockery test is too imprecise and subjective a test. Furthermore, the standard is incompatible with the constitutional mandate of counsel for indigent defendants. The effect of it is to condone incompetent or ineffective representation so long as counsel does not "make the proceedings a farce and mockery of justice."**

When counsel is appointed by a Court, that Court has a responsibility to insure that the counsel performs in an adequate and competent fashion, U.S. v. Williams, *supra*, 411 F. Supp. at 856-7. For a court to hold otherwise would make that very appointment a farce and mockery of justice for indigent defendants.

* In Medico, *supra*, and Rickenbacker, *supra*, the court was able to avoid a choice between the rigid and the more relaxed standards, stating that under the facts of these two cases it was not necessary to decide whether to adopt a less stringent standard.

** This standard would also appear to be at odds with current judicial sentiment advocating higher standards of representation. Chief Judge Kaufman, "The Court Needs a Friend in Court," 60 A.B.A.J. 175 (1974); New Admission Rules Proposed for Federal District Courts," 61 A.B.A.J. 945 (1975); Chief Justice Burger, "The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?" 42 Fordham L. Rev. 227 (1973).

Assuming the applicability of the Wight-Schubin test, the threshold inquiry in this case is whether the acts or inaction of trial counsel prejudiced the petitioner's case--Was the essence of a substantial defense blotted out? The answer to this question is a compelling affirmative under the facts of this case.

In point of fact, Trial Counsel did not present any defense on behalf of Dennis. He only confused the jury by providing defenses to crimes which could not be charged - Entrapment and mistake with respect to the events on March 26, 1977. While the jewelry loan theory would have presented a substantial defense,* it is not the sole ground for vacating the judgment of conviction.

* The facts relating to the loan, jewelry pledge transaction establishes a clear inference that Dennis did not go to Francisco's room on March 26, 1977 in order to buy heroin. Indeed there is substantial evidence that he did not even know about the heroin prior to entering the room. The surprise of Carol upon hearing that Francisco was in New York, supra at p. 19; the lack of a quick response by Dennis to the message; and the transcript of the meeting on March 26, 1977 between Francisco and Dennis do not refute this inference. If anything, they confirm it.

For example, at the point in time when Dennis might logically be asking Francisco about the jewelry, the transcript reads "inaudible words":

BENNETT:	I was asleep.
FRANCISCO:	Oh, too bad, eh, what's going on?
BENNETT:	(Inaudible word). . . Ana come?
FRANCISCO:	No, eh, eh, downstairs, at a restaurant, downstairs with my brother.
BENNETT:	Your brother come?
FRANCISCO:	Yea. . . (inaudible words) I tell you your stuff up here on top.
BENNETT:	So once, eh (inaudible words) I wanta go.
FRANCISCO:	O.K. . . . (inaudible words)

The failure to present that evidence is but one indication of the failure of trial counsel to thoroughly analyze the Government's case. The essence of a substantial defense is blotted out when trial counsel does not understand or inform the jury of the ultimate facts which must constitute the crime alleged.

The evidence as presented, the summation and charges to the jury necessarily lead to a false conclusion that if the appellant was willing to purchase heroin from Francisco on March 26, 1977 he was guilty of aiding and abetting and conspiracy. He would be guilty even if petitioner had no knowledge of Francisco bringing heroin to New York for him to buy prior to Francisco's arrest on March 25, 1977.

This failure and the consequences of it clearly satisfy the standard espoused by the Second Circuit that "counsel was both grossly incompetent, and that 'the essence of a substantial defense' was thereby blotted out." Schubin, supra, 552 F.2d at 529.

Dennis is told his stuff is up here on top. The next line which could tell us if the stuff is the jewelry has an inaudible portion--DENNIS: "So once, eh (inaudible words) I wanta go."

Then Francisco says "Chiva" Dennis' reply--"Oh, Chiva?" This reply indicates surprise and lack of foreknowledge. The questioning tone is on the tape and accurately transcribed by the government.

Later in the tape Dennis says: "I'm going to take this, take this, test out right away. Eh, what's this here now." (Emphasis supplied)--Dennis wanted the substance identified --when later on he wanted to know the purity, he asks for it --"How good is it?"

POINT IV

THE ENTRAPMENT CHARGE AND OTHER PORTIONS
OF THE JURY CHARGE INDICATING THAT APPELLANT
WAS ON TRIAL FOR CONSPIRACY, AIDING AND ABETTING
WHICH OCCURRED ON MARCH 26, 1977 CONSTITUTE PLAIN ERROR

The entrapment charge, and portions of the other charges given the jury by the Court below convey to the jury the erroneous impression that appellant was on trial for events which took place during the controlled delivery on March 26, 1977. As a result Dennis was convicted for crimes which, as a matter of law, he could not have committed or for which he could not be tried in the Eastern District of New York.

It is undisputed that appellant's trial counsel did not take exception to the charges to the jury and did in fact request the entrapment charge. Therefore, to constitute reversible error the charges must fall within the framework of Rule 52(b), Fed. R. Crim. P.; United States v. Garcia, 528 F.2d 580, 588 (5th Cir. 1976); Screws v. United States, 325 U.S. 91, 107 (1945); United States v. Sherman, 200 F.2d 880, 883 (2nd Cir. 1952).

As previously discussed in some detail on pages 21-22, due to venue and legal impossibilities, appellant could only be tried for acts which took place at or prior to the arrest of Francisco at Kennedy Airport on March 25, 1977. The controlled delivery, etc. on March 26, is only relevant to indicate the

existence of a conspiracy to import heroin and aiding and abetting Francisco prior to his arrest. Although appellant's trial attorney did not understand the case, the Government and the trial court did. They discussed some of the problems which prevent Dennis from being convicted of conspiracy and aiding and abetting on March 26, 1977. (App. pp. 89-95, 117-119).

While these colloquies between the trial judge and counsel only indicate an awareness of the problem, the court below in its opinion denying the § 2255 motion made a specific finding that:

"At trial, the Government initially took the position that Bennett aided and abetted Francisco on March 26, 1977. But because Francisco had become a government agent on that date, the Government abandoned that theory and sought to prove that the conspiracy existed prior to Francisco's March 25, 1977 arrest; that when Bennett arrived at the hotel, he intended to carry out the preplanned heroin transaction."* App. p. 53.

Despite recognizing these problems the court gave the jury an entrapment charge as requested by trial counsel.

Appellant's trial counsel asked for the charge to support his defense that Dennis was entrapped on March 26, 1977 in the Sheraton Motor Inn into aiding and abetting and conspiring with Francisco. As the appellant could not, as a matter of law, conspire with or aid and abet Francisco on March 26, 1977,

* It is unfortunate that the court did not include this paragraph in its charge to the jury with some statements to the effect that one cannot conspire with or aid and abet an agent.

pages 21-22, supra, the entrapment charge was misleading and constitutes plain error.

Certain portions of the other charges compound the error. In particular, the court below charged that the Government must prove that Francisco possessed the heroin with intent to distribute it on March 26, 1977 and that Dennis aided and abetted that possession. (App. p. 36)

Being aware of the problem, the Judge should have given changes to the effect that :

1. Francisco was a government agent after his arrest on March 25.
2. As a matter of law, Dennis could not conspire with Francisco after he became an agent.
3. Dennis could not aid and abet Francisco after he became an agent.
4. Events subsequent to March 25 are only relevant to prove the existence of a prior conspiracy with and the aiding and abetting Francisco's importation of heroin.

The total effect of the entrapment charge, the other charges given and the failure to give the charges specified above was to convey the impression that Dennis was on trial for acts in the hotel room at the Sheraton Motor Inn on March 26, 1977. Accordingly, they constitute plain error. Screws v. United States, supra, 325 U.S. at 107; Bollenbach v. United States, 326 U.S.

607, 610-14 (1946); Doyle v. United States, 366 F.2d 394, 400 (9th Cir. 1966); United States v. Garcia, supra, 528 F.2d at 588; United States v. Sherman, supra, 200 F.2d at 883.

In Bollenbach the Supreme Court stated:

"A conviction ought not to rest on an equivocal direction to the jury on a basic issue." 326 U.S. at 613.

"A charge should not be misleading. Legal presumptions involve subtle conceptions to which not even judges always bring clear understanding. In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.

Accordingly, we cannot treat the manifest misdirection in the circumstances of this case as one of those "technical errors" which do not affect the substantial rights of the parties "and must therefore be disregarded." (Citations omitted). (326 U.S. at 614).

See also, Brotherhood of Carpenters v. U.S., 330 U.S. 395, 409-12 (1946).

The fact that trial counsel asked for the entrapment

charge is immaterial to the question of plain error. Carrado v. United States, 210 F.2d 712, 722 (D.C. Cir. 1954). "It was the judge's duty to instruct the jury correctly, regardless of what theory any party might urge upon him in offering instructions."

POINT V

THE JURY VERDICT IS NOT
SUPPORTED BY SUBSTANTIAL EVIDENCE

Taking the evidence in the light most favorable to the Government, it is not sufficient to support a jury verdict of guilty on either aiding or abetting or conspiracy prior to Francisco's arrest on March 25, 1977. The evidence in sum is as follows:

1. Appellant knew Francisco.
2. Appellant rented a room in a motel adjoining that of Francisco on January 12, 1977 and met with him that day.
3. Appellant had two cards with Francisco's name and telephone number on them.
4. Carol was surprised to hear Francisco was in New York.
5. Carol and the Appellant had attempted to call Francisco several times.
6. Dennis went to see Francisco about eight hours after Francisco left a message with Carol that he had the merchandise.
7. Dennis arrives with only a few dollars and is

surprised to hear that Francisco has Chiva.*

8. Nothing else occurred in the hotel room to indicate a conspiracy with Francisco prior to March 25. It is true that Dennis arranged to see if he could sell some of the heroin for Francisco in the hotel room on March 26 but it is only relevant to show a conspiracy or aiding and abetting prior to March 25. No part of the conversation in the room indicates foreknowledge of the heroin being there.

Mere knowledge of Francisco and a meeting with him does not establish a conspiracy and aiding and abetting prior to March 25, 1977. The evidence after that date is no better and in fact indicates that Carol - an alleged co-conspirator - was surprised to find Francisco in New York. She did not ask about Chiva - she only wanted to know about Francisco's wife etc. At the meeting at the Sheraton Motor Inn, Dennis does not ask about Chiva - it is mentioned by Francisco - Dennis is surprised to hear of it, a fact accurately transcribed by the

* FRANCISCO: Chiva
BENNETT: Oh, Chiva?
[Movement Noise, no conversation]
FRANCISCO: So what's going on, where is eh, where is Carol?
BENNETT: Downstairs, she's downstairs, she didn't come up, you know, no parking space.
FRANCISCO: She no?
BENNETT: No.
BENNETT: I'm going to take this, take this, test out right away. Eh, what's this here now.
FRANCISCO: The pure stuff
BENNETT: Chiva?
FRANCISCO: You know, CHIVA.
BENNETT: O.K. cool.

punctuation of the person who made the transcription. Dennis was in no hurry to come to see Francisco - he did not arrive at the hotel until eight hours after Carol received the call from Francisco. Dennis has no money and even suggests that he may not be able to find a buyer that night.*

This does not constitute substantial evidence for a jury to reasonably infer that the appellant was involved in a conspiracy with Francisco or aided and abetted Francisco prior to March 25, 1977. The only inference which can be drawn from the evidence is that the appellant did not know Francisco was coming to New York with the heroin on March 25, 1977.

-
- * FRANCISCO: Money, you give me money, a little money for me?
BENNETT: No I don't have no money Frankie.
FRANCISCO: Oh my God, I've run out of money, you know, have no money here.
BENNETT: Well I'm going to try and get you some. I'll see if I can sell some of this tonight.
FRANCISCO: Cause, I gotta go tomorrow, you know.
BENNETT: You gotta go tomorrow?
FRANCISCO: I have to go with my brother (inaudible) do it, right here, you know and Ana is sick.
BENNETT: Ooh.

CONCLUSION

For the above stated reasons Appellant Dennis Bennett's Judgement of Conviction and the order denying the § 2255 petition should be reversed.

Respectfully submitted,

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OF COUNSEL

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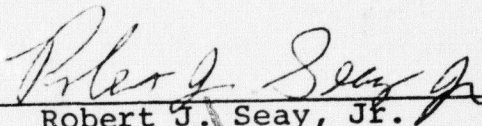
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

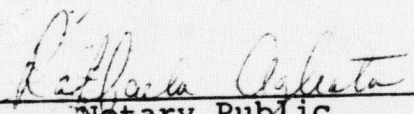
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UNITED STATES OF AMERICA, :
 :
Appellee, : Docket No. 77-1443
 : Docket No. 78-T8792
-against- :
 :
DENNIS BENNETT, : AFFIDAVIT OF SERVICE
 :
Defendant-Appellant. :
----- X

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

ROBERT J. SEAY, JR., being duly sworn, deposes and says
that he is an employee of the firm of Dunnington, Bartholow &
Miller, that he is over the age of eighteen years, that on the 19th
day of June, 1978 he served a copy of the Brief for Dennis Bennett
and Appendix on the U. S. Attorney for the Eastern District of New
York by delivering said copy to a clerk in the office of the U. S.
Attorney at the U. S. Courthouse at 225 Cadman Plaza East, Brooklyn,
New York.


Robert J. Seay, Jr.

Sworn to before me this
20th day of June, 1978.


Notary Public
RAFFAELA AGLIATA
Notary Public, State of New York
No. 41-4645647
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1979

Docket No. 77-1443

Docket No. 78-T8792

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- x
UNITED STATES OF AMERICA, :
 :
Appellee, :
 :
-against- :
 :
DENNIS BENNETT, :
 :
Defendant-Appellant. :
----- x

AFFIDAVIT OF SERVICE
